(3)

Supreme Court, U.S.
FILED
MAY 23 1994
OFFICE OF THE CLERK

No. 93-1752

In the

Supreme Court of the United States

October Term, 1993

Fairfax County School Board,
Petitioner,

v.

Fairfax Covenant Church,
Respondent.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF *AMICI CURIAE* OF NATIONAL SCHOOL BOARDS ASSOCIATION AND THE STATE OF CALIFORNIA IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

GWENDOLYN H. GREGORY
Counsel of Record

Deputy General Counsel
National School Boards
Association (NSBA)
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722

AUGUST W. STEINHILBER
NSBA General Counsel

THOMAS A. SHANNON
NSBA Executive Director

DANIEL E. LUNGREN
Attorney General of the
State of California

TRACEY BUCK-WALSH
Spec. Asst. Attorney
General of the
State of California

1515 K Street
Sacramento, CA 95814
(916) 324-5478

31 pp

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES i

INTEREST OF THE AMICUS 1

REASON FOR GRANTING THE WRIT 5

ARGUMENT 5

I. Current state and federal law has led many school boards nationwide to a good faith determination that it is unconstitutional to allow a church to use school facilities for religious services on a permanent basis. This Court should provide guidance on this complex issue to avert the need for perpetual litigation and the unfair imposition of damages and attorneys' fees on schools in this situation. . . 6

II. Widmar v. Vincent and Lamb's Chapel v. Center Moriches School District did not decide the issue of whether the concept of "equal access" includes permanent use by churches of public school facilities for religious services. Until this Court answers that question, school districts despite their best efforts to comply with the law will continue to be exposed to liability under either the free speech or establishment clauses.10

III. The facts in this case clearly illustrate the precarious balancing of first amendment principles in which schools are forced to engage without a guiding hand from this Court. 16

IV. The court of appeals has imposed a new standard of proof unrecognized by this

Court's establishment clause analysis. None of this Court's establishment of religion cases has required a factual showing that a state practice or policy is "perceived" by the public as establishing religion. The new standard makes it impossible for school districts to walk the tightrope between free speech and establishment of religion. 17

V. The only "safe" alternative open to school districts is to close their schools to outside use, thus precluding many communities from access to any suitable buildings for community use. 24

CONCLUSION 26

TABLE OF AUTHORITIES

CASES: PAGE

Aguilar v. Felton, 473 U.S. 402 (1985) 10,.20

Brandon v. Board of Educ. of Guilderland Cent. Sch., 635 F.2d 971 (2d Cir. 1980) 19

County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989) 22

Lamb's Chapel v. Center Moriches School District, 113 S. St. 2141 1993 . . . . . Passim

Lemon v. Kurtzman, 403 U.S. 602 (1971) . .19

Levitt v. Pearl, 413 U.S. 472 (1973) . . .19

School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985) 10

Widmar v. Vincent, 454 U.S. 263 (1981) Passim

OTHER AUTHORITIES:

California Educ. Code §§ 40041(b) and 40043(b) 3

76 Ops. Cal. Atty. Gen. 52 (1993) 3,4

A Sticky Day for School and Religion, Denniston, L. The American Lawyer, June, 1993 12

Church Law & Tax Report, Pub. Christian Ministry Resources 14

No. 93-1752

In the

Supreme Court of the United States

October Term, 1993

Fairfax County School Board,
Petitioner,

v.

Fairfax Covenant Church,
Respondent.

ON PETITION FOR WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF *AMICI CURIAE* OF NATIONAL SCHOOL BOARDS ASSOCIATION AND THE STATE OF CALIFORNIA IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

This brief is filed with consent of both parties. Stipulation of consent is on file with the Clerk of this Court.

INTEREST OF THE *AMICI*

***Amicus* National School Boards Association**

(NSBA) is a not-for-profit federation of this nation's 49 state school boards associations, the Hawaii State Board of Education, and the boards of education of the District of Columbia, the U.S. Virgin Islands, the Territory of Guam and the Commonwealth of Puerto Rico. Founded in 1940, NSBA represents the nation's 95,000 school board members, who, in turn, govern 15,173 local school districts that serve more than 40 million public school students -- approximately 90 percent of all elementary and secondary students in the nation.

School boards across the country, most of which permit their facilities to be used by the public during non-school hours, are in dire need of this Court's guidance as to whether they may or must allow churches to conduct religious services on a permanent basis in the public schools, and on what terms.

Amicus **State of California** is a sovereign state with a specific interest in this case

because its statutory scheme allowing for religious use of school facilities is placed in issue by the decision of the Court of Appeals for the Fourth Circuit.

California permits religious use of school facilities for temporary periods, on a one-time or renewable basis, for entities that lack suitable facilities, at a cost equal to the school district's direct cost. California Educ. Code §§ 40041(b) and 40043(b) (The "Civic Center Act"). The use charge is more than what is charged civic groups, who may use school facilities for free, and less than the fair market value charged groups who solicit contributions and do not remit their receipts to purely charitable causes. No other restrictions on the religious use, specifically the types of expression, are governed by California's statute.

The California Attorney General concluded in 76 Ops. Cal. Atty. Gen. 52 (1993) that the Legislature's enactment of the Civic Center

Act established a designated public forum in public schools and no violation of the United States or California Constitutions arose if religious organizations lacking suitable housing were permitted equal access to such facilities because the benefit conferred on the religious organization was merely incidental to a primary public purpose.

Noting California's tiered approach in granting access to school facilities, the California Attorney General opined:

> [B]y charging for the direct cost of facility use, the state avoids any claim it is making an impermissible gift to religion. By limiting use to unhoused sects the government avoids permanent institutionalization of religious use within a given school facility. Such an occurrence might allow one to reasonably infer the state has placed its imprimatur on a particular religion.

Id. at 63.

Supreme Court guidance is desired by states like California which have enacted balanced statutory schemes in order to

preserve the integrity of both the Free Speech and Free Exercise Clauses of the First Amendment.

REASONS FOR GRANTING THE WRIT

The practice by school boards of limiting use of school facilities by churches for religious services on a permanent basis is widespread across the country because of the general belief by school boards and their lawyers, based on this Court's jurisprudence, that such permanent use would violate the Establishment Clause. Because this Court has not ruled on the issue, school boards are forced to make the untenable choice between violating the establishment clause, risking a lawsuit by churches under the free speech clause or closing the schools for use by the community.

ARGUMENT

The decision by the Court of Appeals for the Fourth Circuit is of sufficient national importance to warrant grant of *certiorari*.

The conflict between the free speech and establishment clauses relating to the use of public school facilities has caused excruciating controversy in the public schools over the past decade. Lawsuits such as that in the instant case are expensive, even in the absence of damages awards, and often are unavoidable because both sides to the debate raise constitutional claims. Where, as here, the issue has not been resolved by this Court, it is particularly difficult for school districts to decide which constitutional provision should prevail. When someone disagrees with the decision made by the schools and sues, the school districts have no choice but to litigate the issue.

I. Current state and federal law has led many school boards nationwide to a good faith determination that it is unconstitutional to allow a church to use school facilities for religious services on a permanent basis. This Court should provide guidance on this complex issue to avert the need for perpetual litigation and the unfair imposition of damages and attorneys' fees on schools in this situation.

The perception of the Fairfax County School Board that extended use of their schools for religious services raises serious establishment problems is not an unusual one. That perception is held by school boards and their attorneys across the land. School boards are counseled to carefully walk the line between assuring equal access to religious groups and stepping into establishment of religion quicksand.

The Petition for *Certiorari* includes in an appendix of citations to various authorities which limit the use of public school facilities by churches in twenty states. Since school boards are creatures of state law, they do not have discretion to use their facilities for purposes other than those designated by state legislatures, courts or attorneys' general.

School boards across the country operate under policies similar to that of the Fairfax County School Board. The National School

Boards Association operates a national clearinghouse of school board policies which includes policies from school boards in at least 30 states. All of the policies are similar in their treatment of religious use of facilities, for example: "in order to avoid the appearance that the school district may sponsor any particular religion and also to avoid the excessive entanglement of religion in the affairs of the school, it is deemed necessary to limit the amount of time that any one religious organization or group may use the facilities of the school for other than recreational purposes" (a suburban school district in Wisconsin); "the Board may rent school facilities to local, established churches during times of expansion or extensive repairs in the congregation's own facility" (a school district in Indiana). The use provided to Fairfax Covenant Church by Fairfax County is actually *more* extensive and accommodating than the use permitted in most

school districts.

It is unfair to school boards and to the taxpayers in their communities to require them to pay damages and attorneys' fees to plaintiffs because the board made a good faith mistake in deciding which clause of the first amendment should prevail in a particular case. The dilemma presented here is unlike the usual situation where the legality of a policy or practice is unclear, and the policymaker can simply wait until the courts rule. Here, if the board decides to allow churches to use school facilities on a permanent basis for religious services, and a court rules that the board violated the establishment clause, the board pays damages and attorneys' fees to the taxpayer plaintiffs. If the board decides to preclude such use, and a court rules that the board violated the free speech rights of the church, the board pays damages and attorneys' fees to the church.

Which constitutional principle is held to

be primary sometimes seems to depend on who is suing. If the plaintiffs complain that their free speech rights are trammeled, courts hold that equal access controls and the establishment clause is not implicated. *Lamb's Chapel v. Center Moriches*, 113 S.Ct. 2141 (1993). If it is a taxpayer suit or a nonadherent who sues under the establishment clause, the courts overturn school district accommodation of religion as an unconstitutional establishment. *See, e.g., Aguilar v. Felton*, 473 U.S, 402 (1985), *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985). The only consistency in these cases is that the school district loses.

II. *Widmar v. Vincent* and *Lamb's Chapel v. Center Moriches School District* did not decide the issue of whether the concept of "equal access" includes permanent use by churches of public school facilities for religious services. Until this Court answers that question, school districts despite their best efforts to comply with the law will continue to be exposed to liability under either the free speech or establishment clauses.

The lower court's decision dwelled almost

in its entirety on the "limited open forum" question; had the case involved a student religious group as in *Widmar v. Vincent*, 454 U.S. 263 (1981), or the showing by an adult religious group of a film as in *Lamb's Chapel v. Center Moriches School District*, *supra*, the lower court would certainly have been correct in stating that its decision "was readily foreseeable in light of *Widmar*." But Respondent's use of school facilities in this case is unlike the uses in either *Widmar* or *Lamb's Chapel*. Respondent does more than merely gather together a group of persons on school premises for religious discussion or to convey a religious viewpoint on a particular subject. Respondent, in effect, converts the school into a church by using numerous classrooms and the auditorium every Sunday until it decides to move.

During oral argument in *Lamb's Chapel*, Justice Souter asked Jay Sekulow, attorney for Lamb's Chapel, whether schools could be used

"to celebrate a mass or a baptism, or something like that," and shortly thereafter Chief Justice Rehnquist counseled Sekulow: "You don't have to defend some of these rather extreme hypotheticals to win your case." "*A Sticky Day for School and Religion*," Denniston, L. *The American Lawyer*, June, 1993, p. 85. But the holding of regular religious services on a permanent basis on school premises is no longer an "extreme hypothetical" because the Fourth Circuit now says such activities can be conducted by a church under the mantel of the free speech clause. However, this Court expressly noted in *Lamb's Chapel* that its decision did not relate to the question of use of facilities for religious services. 113 S.Ct. at 2144 n. 2.

Similarly, the *Widmar* decision did not reach this issue. Justice White apparently did not interpret the majority opinion as deciding that issue.

> I know of no precedent holding that simply because a public forum is open to all kinds of speech--including speech about religion--it must be open to regular religious worship services as well. I doubt that the State need stand by and allow its public forum to become a church for any religious sect that chooses to stand on its right of access to that forum.

454 U.S. at 287 n. 5 (White, J. dissenting).

Justice Powell, writing for the majority in *Widmar* and perhaps in response to Justice White's statement above, stated:

> Neither do we reach the questions that would arise if state accommodation of free exercise and free speech rights should in a particular case, conflict with the prohibitions of the Establishment Clause.

454 U.S. at 273 n. 13. Thus, contrary to the opinion of the court of appeals in this case, the existence of a designated public forum only begins the inquiry as to whether such a policy unconstitutionally advances religion.

Reasonable minds may differ on whether the long term or permanent use of school

facilities for religious services at less than a market rental rate establishes religion (although *amici* have been unable to locate any judicial support for such a practice), but few would contend as the Fourth Circuit did, that *Widmar* "unremarkably controls" the decision. College Bible clubs and educational films on family life cannot under any reasonable interpretation be compared with the perpetual use by a church of a school for weekly religious worship by 800 people, involving use of the school auditorium, 14 classrooms, an auxiliary gymnasium and the parking lot. Pet. App. 45a. Even some proponents of increased use of school facilities for religious purposes agree that this Court has not yet addressed the question of whether allowing religious services in a limited open forum raises establishment problems. For example, a discussion about *Lamb's Chapel* in the September/October, 1993 issue of *Church Law & Tax Report*, published by Christian

Ministry Resources, points out:

> *Note that this was a very narrow ruling.* The Court did not address the issue of whether or not public high school officials who establish a limited public forum can totally exclude religious activities that do not relate directly to the permitted uses of the property. For example, in this case did the church have a legal right to use the school facilities for an evangelistic crusade, or for religious services? These activities obviously would not have related to any permitted use. And yet by opening their facilities to some community groups must school officials make them available to a church for religious services? The Court did not answer this question.

The decision in *Widmar* was even narrower than *Lamb's Chapel* because the forum was limited to student groups, so the Court had no reason to consider the effect of its decision on the question of whether use of the facilities for religious services by churches on a regular basis would pass constitutional muster.

This Court may ultimately decide that there is no legal distinction between use of a public school building on a permanent basis

for religious worship and the type of use in *Widmar* and *Lamb's Chapel*. But it is totally unfair to require school districts to make this giant analytical leap at their peril.

III. The facts in this case clearly illustrate the precarious balancing of first amendment principles in which schools are forced to engage without a guiding hand from this Court.

There is a constitutional continuum between accommodation of religion and establishment of religion. The court of appeals apparently believes that once the school district opens its schools for use by the community, it must accommodate the church by allowing equal access without regard to the establishment clause. Perhaps that is correct, perhaps not. But this Court has never ruled on the question.

Widmar v. Vincent and *Lamb's Chapel* present facts on one end of the continuum where the forum is used for religious speech by students and community groups. The facts in this case present a clear example of the

issue at the other end of the continuum where the church is, in effect, asking that the school be converted into a church on Sundays in perpetuity. The facts in this case present an excellent opportunity for this Court to decide if the establishment clause limits in *any* way, the right to equal access. The court of appeals said "no" and school districts across the land need to know if this is correct.

IV. The court of appeals has imposed a new standard of proof unrecognized by this Court's establishment clause analysis. None of this Court's establishment of religion cases has required a *factual showing* that a state practice or policy is "perceived" by the public as establishing religion. The new standard makes it impossible for school districts to walk the tightrope between free speech and establishment of religion.

There is evidence in the record to show serious community concern and voiced complaints about the use of the school for church services and the appearance that the school system was supporting religion. *See* Pet. App. 25, 51a. But the court of appeals

erred in requiring Petitioner to make a factual showing of public perception of establishment in order to justify its policy of charging market rent to long-term church users. It is difficult enough for school districts to develop policies in this area without also being required to make a factual record supporting the policy in advance of its adoption.

The lower court correctly points out there has been a substantial amount of criticism of this Court's establishment of religion jurisprudence by members of this Court and commentators; nevertheless, those cases remain the law of the land. *Lamb's Chapel v. Center Moriches School Dist.*, 113 S.Ct. at 2148 n. 7. None of this Court's cases holding governmental action unconstitutional under the establishment clause has required *proof* of community perception that the practice endorsed or embraced religion. Justice White dissented in

a number of those cases precisely on the ground that there were no facts in the record to show that the government's action had the effect of advancing religion.

In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), Justice White faulted the majority for its refusal to trust private school teachers to uphold their pledge to teach only secular matter and, instead, holding the statute unconstitutional because it required a school district either to risk the unconstitutional "effect" of publicly funded private school teachers slipping religious teachings into secular courses or to "entangle" government with religion through efforts to monitor the teachers.

In *Levitt v. PEARL*, 413 U.S. 472 (1973), this Court held unconstitutional a statute reimbursing private schools for their teachers' time in preparing and grading tests. The ruling was based on the fact that teacher-prepared tests were *capable* of including

religious material despite the absence of any facts on the record to show that any test ever actually included religious material.

In *Aguilar v. Felton*, 473 U.S. 402 (1985), this Court overturned public funding of public school teacher instruction in private schools on the ground that the monitoring system to assure that the teachers do not inculcate religion would result in excessive "entanglement" with religion. Both Justice O'Connor and then Justice Rehnquist pointed out in their separate dissents that nothing in the record supported a conclusion that public school teachers would proselytize the students. But the majority opinion did not require such a showing.

In his concurrence in *Lamb's Chapel*, Justice Scalia indicated that he could not join in the majority opinion's statement that the use in question "would not signal endorsement of religion in general." Justice Scalia would hold that the use did not violate

the Establishment Clause because granting nondiscriminatory access to Lamb's Chapel "does not signify state or local embrace of a particular religious sect." Nothing in the opinion indicated, however, that the Court requires a factual finding before holding that a policy or practice is unconstitutional. Not only did the Fourth Circuit's opinion fail to address Justice Scalia's concern regarding particular religious sects; it required *evidence* that the community interpreted the use by the church as endorsement of religion.

The lower court discussion of whether there were facts to support a contention that the church "dominates the forum" is misplaced. That inquiry is only relevant where there is a finding that the policy on it face is constitutional. In *Widmar* this Court held that granting equal access to a religious club in a limited open forum does not establish religion, *unless* the use by religious clubs becomes so extensive as to "dominate the

forum." In other words, a policy of allowing equal access to student clubs, including student religious clubs, does not *on its face* violate the Constitution although *as implemented* it may be shown to establish religion. The lower court's discussion of the domination of the forum issue is misplaced here because the court failed to answer the first question *i.e.* whether a policy which allows a church to use the facility for religious services every Sunday on a permanent basis is unconstitutional on its face because of the message sent to the public that the government is embracing a particular religion.

In *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989), the majority held unconstitutional a Christmas display in the county courthouse.

> Whether the key word is "endorsement," "favoritism," or "promotion," the essential principles remain the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on

> questions of religious belief or from "making adherence to a religion relevant in any way to a person's standing in the political community." *Lynch v. Donnelly* [citations omitted.]

492 U.S. at 593-94.

There was no proof in *Allegheny* that the community perceived that the town was endorsing Christianity by including a creche in the courthouse. No polls were conducted. No witnesses were called. The issue in *Allegheny* which was answered in the affirmative, was whether the display of the creche "conveys a message to nonadherents of Christianity that they are not full members of the political community and a corresponding message to Christians that they are favored members of the political community." 492 U.S. at 628 (O'Connor, J. concurring). The Court did not require proof that the message was received, only that it was sent.

The court of appeals in the instant case, however, required the Fairfax school board to

prove the effect of the permanent use of the school by Fairfax Covenant on the members of the community. The only way to meet that burden is to allow the church services year after year until sufficient empirical evidence of a perception of endorsement is gathered. Meanwhile, the district may end up in court defending its practice against a claim that it is establishing religion.

V. The only "safe" alternative open to school districts is to close their schools to outside use, thus precluding many communities from access to any suitable buildings for community use.

Most, if not all, school districts open their buildings for use by the public when not otherwise in use for school purposes. In many smaller communities the public school may be the only building suitable for meetings, sporting events and other activities.

As pointed out in the Petition herein, school districts in 20 states are prohibited by state law or state attorney general directive from allowing churches to use school

facilities on a permanent or continuing basis for religious worship. Whether these statutes are constitutional or the attorneys' general opinions are correct begs the question. Only this Court can decide who is correct and, in the absence of that decision, school boards must rely on the best legal advice they can obtain.

The only alternative to placing themselves between the constitutional Scylla and Charybdis is to close down the schools to after hours use. That may be a legal option, but as a practical matter, it is no option at all. Were the public schools to be closed for use by the community during non-school hours, members of the communities would rightfully rise up in anger at such miserly use of public property.

At the same time that school districts throughout the country are suffering losses of revenue, the educational and social needs of public school students are on the increase.

It would be unfortunate to subject these districts to the award of significant retroactive damages because of their good faith attempt to comply with the U.S. Constitution, without the endorsement of that result by the highest court in the land. Litigation costs and large damage awards (Fairfax County could be subject to as much as $1,157,000 in damages, Pet. App. 29, 57a) would be an enormous burden on any school district, but most of the school districts in this country are small and rural (Nebraska, for example has recently consolidated into nearly 1000 school districts) and a retroactive award like the one in this case could bankrupt them.

CONCLUSION

For the reasons stated above, *Amici* urge

this Court to grant the petition for *certiorari*.

Respectfully submitted,

GWENDOLYN H. GREGORY
Counsel of Record

Deputy General Counsel
National School Boards
Association (NSBA)
1680 Duke Street
Alexandria, VA 22314
(703) 838-6722

AUGUST W. STEINHILBER
NSBA General Counsel

THOMAS A. SHANNON
NSBA Executive Director

DANIEL E. LUNGREN
Attorney General of th
State of California

TRACEY BUCK-WALSH
Spec. Asst. Attorney
General of the
State of California

1515 K Street
Sacramento, CA 95814
(916) 324-5478

BEST AVAILABLE COPY